

Attachment 1:
Policy Statement of the
California Regional Water Quality Control Board, Los Angeles Region
In Opposition to the Request for Stay of the Los Angeles County MS4 Permit
March 20, 2002

Policy Statement of the Los Angeles Regional Water Quality Control Board

The Los Angeles Regional Water Quality Control Board (Regional Board) strongly opposes the stay requested by the City of Arcadia, et al. (Arcadia) and the City of Los Angeles (Los Angeles, collectively Stay Proponents). The Stay Proponents carry the substantial burden of *providing proof* (1) of substantial harm to the Stay Proponents if a stay is not granted, (2) of a lack of substantial harm to the public interest if a stay is granted, *and* (3) that substantial questions of fact or law exist regarding the underlying permit. (Cal. Code Regs., tit. 23, § 2053.) In each respect the Stay Proponents have failed, and the State Board should deny the requests.¹

Background

The Regional Board unanimously adopted the Los Angeles County municipal separate storm sewer system (LA MS4) permit on December 13, 2001. The permit was the third iteration of the LA MS4 permit, and like all successive MS4 permits, the LA MS4 permit incorporates incremental BMP provisions to reflect the Clean Water Act requirement to “reduce the discharge of pollutants to the maximum extent practicable” and to “effectively prohibit non-stormwater discharges into the storm sewers.” (33 U.S.C. § 1342(p)(3).) The new and refined permit requirements reflect that prior efforts by the MS4 dischargers have continued to allow highly polluted storm water discharges into the region’s waters.

Tellingly, for all the assaults on the LA MS4 permit, the petitioners without exception have not challenged the underlying permit findings—findings that militate against a stay. The Regional Board’s findings on the highly polluting, impairing nature of storm water discharges

¹ The Regional Board submits this policy statement pursuant to the stay hearing notice, but notes, with frustration, that the hearing notice deprives the Regional Board of a meaningful opportunity to submit a written opposition to the stay requests. The Regional Board has been afforded no opportunity to respond in writing to the 33 pages of legal arguments, and is limited by the State Board’s hearing notice to submit a 5-page, double-spaced policy statement, and proposed oral testimony. At the very least, the Regional Board urges the State Board to carefully consider the January 23, 2002, “Opposition of NRDC and Santa Monica BayKeeper to Petitioners’ Requests for Stay.” The opposition outlines the appropriate standards and details the numerous flaws in the stay requests—flaws Arcadia has not yet cured and that are equally applicable to Los Angeles’ stay request.

are virtually dispositive of the issue of substantial harm to the public. The Regional Board's findings about (i) the toxic make up of urban storm water discharges, (ii) the sources of such pollution, (iii) the failings of the permittees' current efforts under prior permits, and (iv) the dramatic effects storm water has on the region's coastal economies are documented in Findings B.1-11 of the Regional Board's permit. These findings have not been challenged, and demonstrate the continued public harm if a stay is granted.

Los Angeles's Stay Request Lacks Merit

There is No Substantial Harm to Los Angeles if the Stay is not Granted.

Los Angeles wrongly asserts that new trash total maximum daily loads (TMDL) will subject the city to civil liabilities, necessitating a stay. In making its assertion, Los Angeles misinterprets the receiving water language in the MS4 and the trash TMDLs. First, as understood by the State Board and the Regional Board, the MS4's receiving water language is not an absolute limitation, but explicitly acknowledges the manner of compliance. (See Order 01-182, Part 2.3.) If the receiving water language provided an absolute floor, then Part 2.1 would exist in isolation and Part 2.3 would be omitted as surplusage. Instead, the State Board's language (included in the LA MS4 permit) goes on to specify the manner in which the cities must comply with the receiving water limitation. Namely, the cities must comply through the iterative process of revisions to the Stormwater Quality Management Plan (SQMP).

The Regional Board's interpretation of the receiving water language is logical and compels the conclusion that there is no substantial harm to the Stay Proponents if a stay is not granted. If the cities make appropriate revisions to the SQMP, in recognition of any receiving water violation, then the receiving water language affords protection. It would be the Stay Proponents' deficient SQMP revision efforts that would subject the cities to liability. Further, the harm is wholly speculative, based on the city first violating a receiving water standard,

failing to take appropriate action, and then a party bringing an enforcement action. A stay is not warranted in these circumstances because the threat of substantial harm is so attenuated and the harm would arise only if the Stay Proponents disregard their clear responsibility to meaningfully revise the SQMP where it is deficient.

There is No Substantial Question of Law or Fact with Respect to the Receiving Water Language

Los Angeles's stay request must fail because there is no substantial question of law and fact with respect to the receiving water language. First, Los Angeles's entire request for a stay is based on a false premise: namely, that the trash TMDL somehow creates something new and novel. The receiving water language in the LA MS4 permit is virtually identical to the language sanctioned by the State Board three years ago and reiterated last fall in the State Board's San Diego MS4 decision. There can be no substantial question of law or fact on the receiving water language because the Regional Board has hewed closely to the State Board's precedent.

Los Angeles attempts to wrap its stay request around the trash TMDLs so it can contend there is something new or novel in the LA MS4 permit presenting a substantial question of law. The city's request is nothing more than a stay request on the State Board-sanctioned receiving water language. The Basin Plan has long had a water quality objective (WQO) prohibiting floating materials, including solids, in the receiving waters. It does not matter that the trash TMDLs translates the Basin Plan's WQO to ultimately mean no trash in the applicable water bodies, because the underlying receiving water limitation is the same WQO: no floating materials, including solids. During the State Board's trash TMDL hearing, the State Board's counsel explained that trash TMDL does not create a new WQO. Regardless, under State Board precedent, discharges from the LA MS4 must comply with receiving water standards.

Arcadia's Stay Request Lacks Merit

As an initial matter, the Regional Board observes that the State Board has substantially

narrowed the issues it will consider on the merits. By narrowing the issues, the State Board has already deemed many issues Arcadia raised in its petition, and reiterated in its stay request, as not substantial or appropriate for State Board review. (See Cal. Code Regs., tit. 23, § 2053(a).) As a result, the scope of the Arcadia stay request should be limited solely to the issues the State Board intends to review. Once limited accordingly, it is clear that Arcadia's Stay Request fails each of the three prongs set forth in the State Board's regulations governing stays.

There is No Substantial Harm to Arcadia if the Stay is not Granted

Arcadia alleges that "countless" program elements will be required under the LA MS4 during the pendency of Arcadia's petition. The Arcadia stay request stands alone in its assertion of these generalized harms if the stay is not granted. It is noteworthy that the 52 cities not represented by Arcadia's counsel do not request a general stay and they do not argue that there is substantial harm from commencing implementation of revised programs immediately or in compliance with the schedule set forth in the MS4 permit. These 52 cities and the county, the principal permittee, represent more than 80% of the land area and population subject to the MS4, and they do not argue for a general stay. Instead, a few inland cities, who continue to impose the costs of their pollution on downstream communities, seek a stay and further delay of storm water pollution improvements for downstream and coastal cities.

In addition, unlike waste discharge requirements that may require substantial capital investments in new treatment facilities, the LA MS4 reflects an iterative BMP-based approach. First, the Regional Board will show that most program elements are carried forward from prior permits. Many of the 41 program elements identified by Arcadia with upcoming deadlines are simply requirements that already exist under the present MS4 permit. A stay will not relieve Arcadia from these requirements. Second, the dischargers are not required to build new treatment facilities—which is why the \$53-billion "study" on which certain cities rely is so

meaningless: the study predates the permit and assumes a permit and permitting approach the Regional Board never pursued. There is no substantial harm to Arcadia if the stay is not granted.

There is Substantial Harm to the Public if the Stay is Granted.

As indicated above, the Stay Proponents have all but conceded the Regional Board's findings on the significant environmental, social, and economic costs associated with urban storm water runoff on downstream and coastal communities. If a stay is granted, the State Board will magnify this harm. The Regional Board has set in process incremental changes to the SQMP that will result in improvements before the next wet season. A general stay would ensure that important program improvements can not be made before the next wet season.

Further, a stay will allow additional projects throughout the county to be developed without SUSMP provisions. Once these projects are commenced, the storm water benefits available through SUSMPs, benefits the State Board has recognized in its SUSMP order, will be lost in perpetuity for the project. If a stay is granted, the incremental storm water improvements for the ministerial projects commenced during the stay period will never be regained.

The Challenged Issues Do Not Raise Substantial Questions of Law or Fact.

Many of the program elements challenged by Arcadia existed in the prior MS4 permit, and all are within the broad ambit of Clean Water Act section 402(p)(3)(B)(iii) which allows the Regional Board to identify measures and controls to reduce pollutants to the maximum extent practicable. Further, the Regional Board will demonstrate that many of the challenged elements already existed in the prior MS4 permit, and exist in other MS4 permits in the state and throughout the country. To the extent these elements have been incorporated elsewhere, it disposes of the question whether there is a substantial question of law or fact: the elements are lawful and have been carried out elsewhere.

Conclusion

For all the foregoing reasons, the State Board should deny the stay requests.